

STATE OF MICHIGAN
COURT OF APPEALS

YVONNE MARSIN, Personal Representative of
the Estate of ROBERT H. MARSIN, Deceased,

Plaintiff-Appellant,

v

DAIMLERCHRYSLER CORPORATION,

Defendant-Appellee.

UNPUBLISHED
September 20, 2005

No. 254326
Macomb Circuit Court
LC No. 03-000383-NI

Before: Bandstra, P.J., and Neff and Donofrio, JJ.

PER CURIAM.

Plaintiff appeals as of right an order granting defendant's motion for summary disposition. Because plaintiff can not support an intentional tort theory in avoidance of the exclusivity provision of the Michigan Worker's Disability Compensation Act, we affirm. This case is being decided without oral argument pursuant to MCR 7.214(E).

Because a claim is barred by the exclusive remedy provision of the Michigan Worker's Disability Compensation Act ("WDCA"), MCL 418.131, a motion for summary disposition of dismissal challenges subject matter jurisdiction. Review of a decision on the motion is de novo, and the appellate court must determine whether the pleadings demonstrate that the defendant was entitled to judgment as a matter of law or whether the affidavits and other proofs showed that there was no genuine issue of material fact. MCR 2.116(C)(4); *Bock v General Motors Corp*, 247 Mich App 705, 709-710; 637 NW2d 875 (2001). "A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. In evaluating such a motion, the trial court considers the entire record in the light most favorable to the party opposing the motion, including affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties. Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law." *Corley v Detroit Board of Education*, 470 Mich 274, 278; 681 NW2d 342 (2004).

Under the WDCA, worker's compensation benefits are the exclusive remedy for a personal injury unless the injury resulted from an intentional tort, and thus, an employer is immune from tort liability except as to intentional torts. MCL 418.131(1); *Bock, supra* at 710. Under the exclusive remedy provision of the WDCA, an intentional tort exists only when an employee is injured as the result of a deliberate act of the employer and the employer specifically intended an injury. An employer is deemed to have intended to injure if it had actual knowledge

that an injury was certain to occur and wilfully disregarded that knowledge. The issue whether an act was an intentional tort is a question of law for the court. The intentional tort provision of the WDCA does not reduce or enlarge rights under law. MCL 418.131(1); *Id.* at 710-711. To establish an intentional tort under the WDCA, a plaintiff must show that a supervisory or managerial employee had actual knowledge that an injury would follow from what the employer deliberately did or did not do. An injury is certain to occur if there is no doubt that it will occur, and demonstration of the probability that something will occur is insufficient to establish certainty. *Id.* at 711.

We hold that the trial court did not err in granting defendant summary disposition. Plaintiff's complaint alleged that defendant's failure to implement a policy was "grossly negligent and tantamount to an intentional tort." However, defendant had a policy in place at the time of the incident with respect to "medical emergency" responses. In fact, the medical emergency response policy was implemented and expressly followed in the instant case. Therefore, plaintiff's claim that defendant failed to implement a medical response policy is without merit.

Even so, plaintiff's intentional tort claim fails as a matter of law. Plaintiff's complaint alleged that defendant's failure to implement a policy was "grossly negligent and tantamount to an intentional tort." However, allegations that sound in gross negligence are insufficient to constitute an intentional tort within the meaning of the WDCA. *Bock, supra* at 712. Under the WDCA, an intentional tort exists only when an employee is injured as the result of a deliberate act of the employer and the employer specifically intended an injury. For an employer to have specifically intended an injury "the employer must have had in mind a purpose to bring about given consequences." *Gray v Morley*, 460 Mich 738, 746; 596 NW2d 922 (1999), quoting *Travis v Dreis & Krump Mfg Co*, 453 Mich 149, 171; 551 NW2d 132 (1996). "In other words, [the employer] must have had the particular purpose of inflicting an injury upon his employee." *Id.*, quoting *Travis, supra* at 172.

The decedent seemed normal at the time the decedent's supervisor, David Roman, made his rounds at 2:00 a.m. In addition, the decedent's co-worker, Conrad Krusinski, saw the decedent at approximately 5:00 a.m., in a restroom in the facility. The two men talked and there was no indication that the decedent was ill. The evidence presented suggests that defendant did not know that the decedent was suffering a heart disorder, let alone defendant having in mind the purpose of ultimately causing the decedent's death.

Further, plaintiff has failed to establish that defendant had actual knowledge that the decedent's injury was certain to occur and wilfully disregarded that knowledge. *Bock, supra* at 710-711. The record indicates that both Roman and security personnel were unaware that the decedent had a heart condition. Upon discovering the decedent's condition, plant personnel followed the standard procedures to treat the decedent and had him transported to the hospital. There was no actual knowledge on defendant's behalf that the decedent's death was certain to occur. Roman's affidavit established that the decedent, although unresponsive, was breathing normally at the time Roman responded to the scene. Therefore, plaintiff has failed to demonstrate that defendant wilfully disregarded any knowledge that the decedent's death was certain to occur. In fact, defendant was very timely in its response to the decedent's sudden condition and the decedent received medical assistance in a timely fashion. Therefore, plaintiff

has failed to demonstrate that the trial court erred in granting summary disposition to defendant.

Affirmed.

/s/ Richard A. Bandstra

/s/ Janet T. Neff

/s/ Pat M. Donofrio